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FIBER TECHNOLOGIES NETWORKS, L.L.C.	)	
140 Allens Creek Road	)	
Rochester, NY 14618	)	
	)	
Complainant,	)	
	)	
v.	)	D.T.E. 01-70
	)	
TOWN OF SHREWSBURY ELECTRIC	)	
LIGHT PLANT	)	
100 Maple Avenue	)	
Shrewsbury, MA 01545-5398	)	
	)	
Respondents.	)	
	)	

Shrewsbury’s Electric Light Plant (“SELP”) does not dispute the essential fact that Fiber Technologies Networks, L.L.C. (“Fibertech”) has filed a Statement of Business Operations and tariffs; it cannot dispute that this SBO describes as Fibertech’s initial business to “develop and lease high capacity dark fiber ...” a telecommunications service under Department decisions and policy. Fibertech’s motion for summary judgment demonstrates that on this basis Fibertech is entitled to judgment as a matter of law. Rather than address the substance of this motion, SELP labors at length to throw some issue of fact in the way of summary judgment. In the end, however, the issues it raises amount to nothing more than misdirection designed to distract from the absence of any real response on the merits. These “issues” are neither genuine nor material and therefore do not establish a basis for denying summary judgment. *See Anderson v. Liberty*

*Lobby, Inc.*, 477 U.S. 242, 248 (1986)(a factual dispute cannot defeat summary judgment if it is not both genuine and material).

SELP's claim that there remain factual issues rests on the fantastic premise that one might "conclude that, Fibertech is nothing more than a construction company building dark fiber on a speculative basis with no customers currently paying for any 'service' or leasing any fiber – a construction company that is attempting to co-opt a scarce public resource – SELP's poles – in order to extract a maximum profit without any benefit to the public." SELP Response at p. 2. How Fibertech is supposed to "extract a maximum profit" if it does business "with no customers" is mystifying. SELP's premise is simply too speculative to amount to a "genuine" issue for purposes of summary judgment; "[t]he mere existence of a scintilla of evidence" is not enough to defeat summary judgment. *Id.* at 252. The premise is not germane enough to present a "material" issue; a factual dispute is "material" only if it "might affect the outcome" of the suit under governing law ... ." *Anderson*, 477 U.S. at 248; *accord, e.g., National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1<sup>st</sup> Cir. 1995).<sup>1</sup>

Rather than address the issues on the merits, SELP simply sidesteps them. SELP claims "there is a genuine issue of material fact as to what type of business Fibertech is actually engaged in, despite the existence of its SBO and tariffs"<sup>2</sup> but does not address the threshold question raised by Fibertech's summary judgment motion – whether the "existence of [Fibertech's] SBO and tariffs" is conclusive of Fibertech's status as a licensee within the meaning of Section 25A. More generally, SELP never demonstrates *how* "[w]hat type of

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<sup>1</sup> Just as the Massachusetts Rules of Civil Procedure are "instructive" before the DTE, 220 C.M.R. § 1.06(b)(1), the Massachusetts rules are "patterned after federal rules ..." and are interpreted "consistently with the construction given their federal counterparts ... ." *Solimene v. B. Gravel & Co., KG*, 399 Mass. 790, 800 (1987). The SJC followed the Supreme Court's 1986 summary judgment "trilogy" in *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991).

<sup>2</sup> SELP Response at p. 8.

business Fibertech is actually engaged in” will inform the Department’s decision whether Fibertech is a licensee and its dark fiber an attachment within the meaning of Section 25A. Likewise, SELP makes no demonstration as a matter of law as to how the question whether SELP has “customers currently paying for any ‘service’ or leasing any fiber ...” affects the question whether dark fiber attachment (with or without customers) is an attachment within the meaning of G.L. c. 166, § 25A and whether dark fiber is “wire or cable for the transmission of intelligence ...” SELP simply elaborates a series of questions it claims are outstanding<sup>3</sup> without addressing how any of these questions may change the legal outcome of the case. Accordingly, SELP fails to demonstrate how the issues it seeks to raise are material to the Department’s decision.

The discovery issue on which, more than anything, SELP hangs its response is not material because it does not change the basis of Fibertech’s motion. Nothing in SELP’s serial requests for customer agreements and information about customers changes the fundamental fact that Fibertech has filed an SBO for “a high capacity dark fiber network.” Exhibit 4 to Fibertech Motion for Summary Judgment at pp. 2, 3. On this basis, Fibertech is entitled to utility pole attachments as a matter of law. SELP’s inquiry makes little sense: if a new entrant must have customers doing business before it can obtain pole attachments, facilities-based entry would be impossible, and no telecommunications provider should be forced to turn over customer lists, agreements, and information about customers’ business as a threshold for obtaining attachments. *See Marcus Cable Associates, L.P.*, FCC P.A. No. 96-002, ¶¶ 22, 24 (released July 21, 1997) (cable operator “is under no obligation to [utility] to disclose any information regarding the lease of its capacity to third parties,” and pole attachment condition requiring “disclosure of the names of [operator’s] nonvideo transmission customers” unjust and unreasonable).

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<sup>3</sup> *See id.* at p. 10.

In its attempt to suggest issues of fact, SELP makes wild and unsupported assertions. It claims an issue as to whether Fibertech's SBO "accurately reflects the nature of its business and business plans, specifically as they relate to pole attachments," and alleges "Fibertech has not filed an SBO or tariffs for the 'provision of dark fiber.'" SELP Response at p. 8. SELP does not back up this allegation with factual support.<sup>4</sup> In fact, Fibertech's SBO speaks for itself; it describes "a high capacity dark fiber network" and an initial service to "develop and lease high capacity dark fiber for use by Government/Education, business and various communication carriers (ILEC, CLEC, IXC, ISP)."

Likewise, SELP asserts that "it is highly unusual for a *real* CLEC to construct its own redundant system; most CLECs simply lease unbundled network elements ('UNEs') from incumbent local exchange carriers ('ILECs')." SELP Response at p. 9 (emphasis in original). This sweeping assertion is startling given that communications law and policy firmly recognize as paths of entry into local competition both resale and facilities-based competition in addition to UNEs and that some even have suggested only facilities-based carriers are "real" CLECs. *See* 47 U.S.C. §§ 251(c)(4) (ILECs offer retail services at wholesale rates for resale); 271(c)(1)(A) (RBOC entry into interLATA competition ordinarily requires presence of a facilities-based competitor); Local Competition Order<sup>5</sup> at p. 11, ¶12 ("The [Telecommunications] Act contemplates three paths of entry into the real market – the construction of new networks, the use of unbundled elements of the incumbent's network, and resale") (emphasis added). *See also*

Third Report and Order, *In re: The Implementation of the Local Competition Provisions of the*

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<sup>4</sup> Is SELP seriously also suggesting that something in the Department's SBO form calls for information as to a telecommunications service provider's plans "specifically as they relate to pole attachment?" *See Application of Teleport Communications Boston*, D.P.U. 88-60/88-71 at pp. 17-21 (1988) (granting certification to carrier of "high capacity telecommunications services to a small number of large business users over a metropolitan area network" using fiber optic technology).

<sup>5</sup> First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and CMRS Providers*, 11 FCC Rcd 15499 (released August 8, 1996).

*Telecommunications Act of 1996*, 15 FCC Rcd. 3696 at ¶ 10 (1999) (“*UNE Remand Order*”) (“we have seen the development of facilities-based competition among providers of particular services in certain sectors of the market. For example ... competitors have deployed their own fiber rings ... .”); Evaluation of Massachusetts Department of Telecommunications and Energy, *In the Matter of Application of Verizon New England, Inc. for Authorization Under Section 271*, FCC CC Docket No. 00-176 (filed Oct. 16, 2000 at p. 26) (accepting Verizon submission that “competing carriers” in Massachusetts serve more than 400,000 subscribers “over their own facilities” and finding that “some CLECs” have interconnection “for services offered exclusively or predominantly over the CLECs’ facilities”). CLECs provide a spectrum of services and – notwithstanding SELP’s idiosyncratic understanding of local exchange competition and of CLECs – Fibertech falls well within this spectrum. SELP has introduced no prefiled testimony or affidavits to show otherwise and support its dubious claim of what “a *real* CLEC” does.

SELP also purports to dispute whether “carrier’s carriers” fill an important role in developing telecommunications competition, citing outside the record to recent news articles. SELP Response at p. 12-13. But it has never developed any testimony or other evidence to place this contention in issue. It is well settled that factual issues on summary judgment must be based on evidence, not mere allegations. Mass. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). On summary judgment, the Department looks to “the initial pleadings, pre-filed testimony, responses to discovery and the memoranda of the parties.” *Investigation of Gaslantic Corp.*, D.P.U./D.T.E. 96-101 at p. 6 (1999). SELP cannot claim it has not had an opportunity to develop any of these issues, because Fibertech’s SBO has been produced, and SELP’s disputed discovery on Fibertech’s New York and Connecticut customers does not go to whether CLECs in

general build their own facilities or what has been the role of carrier's carriers in the marketplace.

SELP suggests that Fibertech's statement that SELP denied access to poles "purportedly" on the basis that Fibertech is a dark fiber carrier and has not received grants of location amounts to an admission that there are issues of fact. SELP Response at p. 11. On the contrary, for purposes of summary judgment, Fibertech accepts at face value SELP's reasons for denying access to poles.

This is not to say that there are not issues of fact as to the good faith of SELP's stated reasons, as Fibertech noted in its motion for summary judgment.<sup>6</sup> The undisputed documents appended to Fibertech's motion as exhibits speak for themselves; they reflect that SELP was willing to permit Fibertech attachments provided Fibertech agreed to accept (among other terms and conditions) SELP's requirement that it "will not permit any taps or laterals into its fiber optic cable within Shrewsbury for Fiber Systems to serve any customers in Shrewsbury, except as SELP may allow for its sole benefit." (Exhibit 10.) Fibertech believes, that if this matter goes to hearing, the Department would conclude on the basis of this evidence that SELP's denial of access to its poles was motivated by a blatant desire to exclude any competition for customers in Shrewsbury and preserve these customers "as SELP may allow for its sole benefit." Likewise, Fibertech believes that the evidence (including cross-examination of SELP's manager Thomas Josie) would show that other justifications SELP puts forward likewise are mere excuses. But, for purposes of summary judgment, the Department may decide on the basis of SELP's purported reasons without having to decide what its real reasons were.

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<sup>6</sup> Motion for Summary Judgment of Fiber Technologies Networks, L.L.C. at pp. 2, 16 (filed March 1, 2002) ("open and potentially disputed facts as to SELP's competitive motives ... . To exclude competition may prove ... to have been SELP's intent ...).

SELP has failed to demonstrate that these grounds have a sound legal basis, instead suggesting unsupported, far-fetched factual issues should forestall summary judgment on narrow legal grounds, and failing to demonstrate how any of these supposed issues supports a valid legal basis for denying access to its poles. In addition:

- ?? SELP contends that “nothing in the TCA currently classifies ‘dark fiber’ or the ‘provision of dark fiber’ as a ‘telecommunications service.’” SELP Response at p. 12. This utterly disregards the *Global NAPs* case, Department letter, and related authority cited in Fibertech’s main brief. Indeed, this controlling case is studiously unmentioned. There could not be a more blatant example of SELP’s avoidance of the legal merits.
- ?? SELP claims that “regulation of wires over and under public ways in Massachusetts is reserved to cities and towns.” SELP Response at p. 11. This assertion is incorrect given the SJC’s clear statement that cities and towns administer grants of location under a delegation from the Commonwealth intended to supersede local authority in *New England Tel & Tel. Co. v. City of Brockton*, 332 Mass 662, 668 (1955). The extent to which a Town (not SELP) can regulate grants of location based on the issues of safety and aesthetics that may “incommode the public use” is not at issue here, however; what is at issue is SELP’s claim that the Light Department or a municipality can conduct its own independent consideration of whether a carrier that has filed a tariff and submitted a Statement of Business Operations with the Department is a common carrier.
- ?? Much of SELP’s response takes poetic license with the discovery dispute now before the Department on appeal from hearing officer rulings. With respect to discovery sought by SELP, this dispute involves the single issue of customer information; what SELP terms “an unusual number of pleadings” results from a series of requests SELP has made that all ask in different ways for the same information, leading under the Department’s timetable for discovery motions<sup>7</sup> to serial motions to compel by SELP. In fact, Fibertech’s later pleadings simply incorporate by reference its earlier arguments on the same issue.

For the foregoing reasons as well as the reasons stated in Fibertech’s initial motion for summary judgment, SELP fails to demonstrate any reason why summary judgment in Fibertech’s favor should not be granted. This case already has extended beyond the 180-day period that the Department’s rules provide for adjudicating a complaint of this kind. *See* 220

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<sup>7</sup> 220 C.M.R. 1.06(c)(4) requires that motions to compel be filed within seven days of receiving the disputed discovery response.

C.M.R. § 45.08.<sup>8</sup> SELP has refused attachments for almost two years now. The issues unquestionably are important, but they are not complex. Precisely because this matter is important, the Department should not permit further delay.

Respectfully submitted,

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<sup>8</sup> The parties agreed to a “temporary” suspension of the procedural schedule, and to waive the 180-day period “by as many days as the suspension of the procedural schedule remains in effect.” Joint Motion to Temporarily Suspend Procedural Schedule (granted Nov. 30, 2001). This contemplated an early resumption of the procedural schedule, as occurred settlement discussions failed. *See* Hearing Officer Memorandum to Parties (Dec. 17, 2001). Since then, however, the temporary suspension of the procedural schedule has become indefinite, causing the temporary tolling of the 180-day time limit to become indefinite as well.